
Sri Sivasakthi Auto Ancillaries Madras Pvt. Ltd Vs CESTAT, Chennai

Civil Miscellaneous Appeal No. 1853, 1857, 2224-2225 of 2014 and M.P. No. 1 of 2014

Court: Madras High Court

Date of Decision: Aug. 14, 2014

Acts Referred:

Central Excises and Salt Act, 1944 "Section 11, 11A, 35F

Citation: (2014) 310 ELT 266

Hon'ble Judges: R. Sudhakar, J; G.M. Akbar Ali, J

Bench: Division Bench

Judgement

R. Sudhakar, J.

C.M.A. Nos. 1853 and 1857 of 2014 are filed challenging the Misc. Order Nos. 40788 and 40787 of 2014, dated 13-

5-2014 passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai (for brevity, "the Tribunal"). C.M.A. Nos. 2224 and 2225 of

2014 are filed challenging the Final Order Nos. 40383 and 40384 of 2014, dated 2-7-2014 passed by the Tribunal.

2.1 The brief facts of the case are as under: The appellant is engaged in the manufacture of Sheet Metal Pressed Automobile Components falling

under Chapter 87 of CETA, 1985. The assessee cleared the finished goods on payment of duty.

2.2 As per Rule 8(1) of the Central Excise Rules, 2002, duty on goods removed from the factory or warehouse during a month shall be paid by

the 5th day of the following month, and in the case of goods removed during the month of March, the duty shall be paid by the 31st day of March.

It also provides for other conditions, of which we are not concerned.

2.3 Rule 8(3) of the Central Excise Rules, 2002 provides that if the assessee fails to pay the amount of duty by due date, he shall be liable to pay

the outstanding amount along with interest at the rate specified by the Central Government vide notification under Section 11AB of the Central

Excise Act on the outstanding amount, for the period starting with the first day after due date till the date of actual payment of the outstanding

amount.

2.4 Rule 8(3A) of the Central Excise Rules, 2002 states that if the assessee defaults in payment of duty beyond thirty days from the due date, as

prescribed in sub-rule (1), then notwithstanding anything contained in said sub-rule (1) and sub-rule (4) of Rule 3 of CENVAT Credit Rules,

2004, the assessee shall, pay excise duty for each consignment at the time of removal, without utilizing the Cenvat credit till the date the assessee

pays the outstanding amount including interest thereon; and in the event of any failure, it shall be deemed that such goods have been cleared without

payment of duty and the consequences and penalties as provided in these rules shall follow.

2.5 The department, in the course of scrutiny of the returns filed by the assessee, found that on several occasions, the assessee had defaulted in

payment of duty beyond 30 days from due date and, therefore, the assessee is liable to pay excise duty for each consignment at the time of

removal without utilizing the Cenvat credit till the date the assessee discharges the outstanding amount with interest, including interest thereon, as

per Rule 8(3A) of the Central Excise Rules, 2002.

2.6 Accordingly, the department issued a show cause notice dated 2-6-2011 demanding duty in respect of clearances of excisable goods from

May, 2010 to December, 2010 under Section 11A of the Central Excise Act, 1944. That apart, interest under Rule 8(3) of the Central Excise

Rules, 2002 read with erstwhile Section 11AB of the Central Excise Act was demanded, and penalty was sought to be imposed under Rule 25 of

the Central Excise Rules, 2002 read with Rule 15(1) of the Cenvat Credit Rules, 2004. The notice was stated as under:

as to why:

(i) to (iii) xxx

(iv) the assessee, having defaulted in payment of duty beyond thirty days from the due date, should not be required to pay excise duty for each

consignment at the time of removal, without utilizing the cenvat credit, till the date the assessee pays the outstanding amount, including interest

thereon, as per Rule 8(3A) of the Central Excise Rules, 2002.

2.7 Likewise, another show cause notice was issued on 3-1-2012 with regard to the clearances of excisable goods for the period from January,

2011 to October, 2011.

2.8 As no reply was received from the assessee for the above two show cause notices, the matter was taken up for adjudication and the original

authority passed Order-in-Original Nos. 8 and 9 of 2012-2013, dated 30-8-2012 in the following manner:

(i) I hereby demand payment of the amount of duty of Rs. 42,84,883/- (Rs. Forty-two lakhs eighty-four thousand eight hundred and eighty-three

only) from the assessee for the clearance of excisable goods effected during May, 2010 to December, 2010, in cash through PLA account in

terms of Rule 8(3A) of the Central Excise Rules, 2002, and Section 11A of Central Excise Act, 1944 along with applicable interest under Section

11AB of the Central Excise Act, 1944 read with Rule 8 of Central Excise Rules, 2002, with reference to SCNs 19/2011, dated 2-6-2011.

(ii) I hereby demand payment of the amount of duty of Rs. 48,46,517/- (Rs. Forty-eight lakhs forty-six thousand five hundred and seventeen only)

from the assessee for the clearance of excisable goods effected during January, 2011 to October, 2011, in cash through PLA account in terms of

Rule 8(3A) of the Central Excise Rules, 2002, and Section 11A of Central Excise Act, 1944 along with applicable interest under Section 11AB of

the Central Excise Act, 1944 read with Rule 8 of Central Excise Rules, 2002, with reference to SCNs 52/2011-12, dated 3-1-2012.

(iii) I also demand interest on the above demand of duty of Rs. 42,84,883/- from the assessee for the clearance of excisable goods effected during

May, 2010 to December, 2010, as demanded in the show cause notice 19/2011 dated 2-6-2011 under erstwhile Sec. 11AB of the Central

Excise Act, 1944. (iv) I also demand interest on the above demand of duty of Rs. 48,46,517/- from the assessee for the clearance of excisable

goods effected during January, 2011 to October, 2011, as demanded in the show cause notice 52/2011-12, dated 3-1-2012 under erstwhile Sec.

11AB of the Central Excise Act, 1944.

(v) I impose a penalty of Rs. 22,85,000/- (Rs. Twenty Two Lakhs Eighty Five Thousand only) under 25 of the Central Excise Rules, 2002 for the

contravention of Rules 4, 6 and 8 of the Central Excise Rules, 2002.

(vi) In case of failure on the part of the assessee to pay the above amounts, for effecting such recoveries, recovery proceedings as envisaged under

Section 11 of the Central Excise Act, 1944 may be initiated against the assessee.

2.9 Challenging the above said order, the assessee filed Appeal Nos. 103 and 104/2012 (M-IV) before the Commissioner (Appeals), along with

stay petitions and at the time of hearing the stay petitions, personal hearing was afforded and the order dated 22-2-2013 passed in Order-in-Stay

Petition Nos. 33 and 34 of 2013 (M-IV) records the stand of the assessee as follows:

He offered to pay 50% of the duty confirmed as pre-deposit but requested to give a month's time and requested to give PH for the main appeal

after one month.

Taking note of the scope of Section 35F of the Central Excise Act and the stand of the assessee, the Commissioner (Appeals) passed the

following order in the stay petitions:

8. In view of the foregoing facts and circumstances and keeping the interest of Revenue & balance of convenience, I order to pay a pre-deposit

of 50% of the duty confirmed, (Rs. 42,84,883/- for the period May, 2010 to December, 2010 and Rs. 48,46,517/- for the period January, 2011

to October, 2011), in Cash/PLA in the impugned Order Nos. 08 & 09/2013 dated 30-8-2012 by 21-3-2013 and waive the pre-deposit of

interest and penalty imposed in the impugned order, under Section 35F of CEA. 9. If the appellants fail to pay the said pre-deposit before the

aforementioned due date, the appeal is liable to be dismissed, for noncompliance to the condition of stay granted in terms of Section 35F of the

Central Excise Act, 1944, without any further notice.

2.10 Aggrieved against the above order, the assessee filed W.P. Nos. 6752 and 6753 of 2013, which came to be disposed of on 20-3-2013

upholding the order of Commissioner (Appeals), however granting further time for compliance of the said order. The relevant portion of the said

order reads as under:

17. Learned counsel for the petitioner made a plea that the date fixed for payment of the pre-deposit amounts is 21-3-2013; since the petitioner

has to mobilise the funds for paying the pre-deposit amount, some time may be granted to the petitioner to pay the pre-deposit amounts ordered

by the second respondent in the impugned order and on such payment, he requested that the second respondent-appellate authority may be

directed to take up the appeals themselves and dispose of the same within a reasonable time limit. Learned counsel for the respondents/Revenue

has no objection for such course.

18. In the light of the above submissions made by the learned counsel appearing for the parties and considering the facts and circumstances of the

case, the petitioner is directed to pay the pre-deposit amounts as ordered by the second respondent-appellate authority in the impugned common

order, dated 22-2-2013, within a period of three weeks from the date of receipt of a copy of this order; on such payment, the second respondent

is directed to take up the appeals themselves and after affording an opportunity of hearing to the petitioner, dispose of the appeals, on merits and in

accordance with law, within a period of four weeks thereafter.

2.11 Aggrieved by the same, the assessee filed W.A. Nos. 935 and 936 of 2013.

2.12 In the meanwhile, the Commissioner (Appeals) took up the appeals pursuant to the direction of the learned Single Judge and passed an order

dated 8-5-2013 dismissing the appeals for non-compliance of the conditional order of stay.

2.13 Assailing the said order, the assessee preferred appeals before the Tribunal along with applications for waiver of pre-deposit and the Tribunal

by Misc. Order Nos. 40787-40790/2014, dated 13-5-2014, held as under:

6. Hence the applicant failed to make out a prima facie case for waiver of entire amount of dues. Accordingly, the applicant is directed to make a

pre-deposit of 50% of the duty i.e. Rs. 45,65,700/- (Rupees forty-five lakhs sixty-five thousand and seven hundred only) within a period of six

weeks and report compliance on 3-7-2014. Upon such deposit, pre-deposit of the balance dues stands waived and recovery thereof stayed

during the pendency of the appeals.

2.14 Aggrieved by the said order dated 13-5-2014, C.M.A. Nos. 1853 and 1857 of 2014 are filed before this Court raising the following

substantial questions of law:

(1) Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in not considering flouting of Rule 8(3A) of the

Central Excise Rules, by the lower adjudicating authority and the lower appellate authority, inasmuch as demanding of duty beyond 21-8-2010,

the date on which the defaulted duty was paid along with interest by the appellant?

(2) Whether the Tribunal is justified in directing to pay pre-deposit of Rs. 45,65,700/- (Rupees forty-five lakhs sixty-five thousand and seven

hundred only), since the petitioner/appellant has already paid the defaulted duty of Rs. 70,046/- along with interest amounting to Rs. 3,467/- on

21-8-2010 and as per Rule 8(3A) of the Central Excise Rules, 2002, the duty that can be demanded by cash by the respondents during the

default period works out to Rs. 19,50,000/- (Rupees nineteen lakhs and fifty thousand only)?

(3) Whether the Tribunal is justified in directing to pay pre-deposit of Rs. 45,65,700/- (Rupees forty-five lakhs sixty-five thousand and seven

hundred only) without going into the facts and appreciating the merits of the case and based only on the Final Order-in-Appeal Nos. 195 &

196/2013 (M-IV), dated 8-5-2013 passed by the Commissioner of Central Excise, Appeals and on the order of the High Court dated 20-3-

2013 in W.P. Nos. 6752 and 6753 of 2013 dealing with pre-deposit alone?

(4) Whether the Tribunal is justified in directing to pay pre-deposit of Rs. 45,65,700/- ((Rupees forty-five lakhs sixty-five thousand and seven

hundred only) in the present case, when the Tribunal itself, for the same appellant, in an earlier appeal, where the facts are similar to the facts of the

case on hand, vide Misc. Order No. 42363/2013, dated 25-9-2013 has directed to pay only interest without any pre-deposit?

(5) Whether the Tribunal is justified in passing different orders for same set of facts involving same issue, for the same appellant both covered by

Rule 8(3A) of the Central Excise Rules, 2002?

2.15 As the conditional order passed by the Tribunal was not complied with, the Tribunal, by Final Order Nos. 40383-40385 of 2014, dated 2-

7-2014, dismissed the appeals. Aggrieved by the said order, C.M.A. Nos. 2224 and 2225 of 2014 are filed raising the following substantial

questions of law:

(1) Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in not considering flouting of Rule 8(3A) of the

Central Excise Rules, by the lower adjudicating authority and the lower appellate authority, inasmuch as demanding of duty beyond 21-8-2010,

the date on which the defaulted duty was paid along with interest by the appellant?

(2) Whether the Tribunal is justified in dismissing the appeal for noncompliance of stay order of directing the appellant to pay pre-deposit of Rs.

45,65,700/- (Rupees forty-five lakhs sixty-five thousand and seven hundred only), since the appellant has already paid the defaulted duty of Rs.

70,046/- along with interest amounting to Rs. 3,467/- on 21-8-2010 and as per Rule 8(3A) of the Central Excise Rules, 2002, the duty that can

be demanded by cash by the respondents during the default period works out to Rs. 19,50,000/- (rupees nineteen lakhs and fifty thousand only)?

(3) Whether the Tribunal is justified in dismissing the appeal for noncompliance of stay order of directing the appellant to pay pre-deposit of Rs.

45,65,700/- (Rupees forty-five lakhs sixty-five thousand and seven hundred only) without going into the facts and appreciating the merits of the

case and based only on the Final Order-in-Appeal Nos. 195 & 196/2013 (M-IV), dated 8-5-2013 passed by the Commissioner of Central

Excise, Appeals and on the order of the High Court dated 20-3-2013 in W.P. Nos. 6752 and 6753 of 2013 dealing with pre-deposit alone?

(4) Whether the Tribunal is justified in dismissing the appeal for noncompliance of stay order of directing the appellant to pay pre-deposit of Rs.

45,65,700/- ((Rupees forty-five lakhs sixty-five thousand and seven hundred only) in the present case, when the Tribunal itself, for the same

appellant, in an earlier appeal, where the facts are similar to the facts of the case on hand, vide Misc. Order No. 42363/2013, dated 25-9-2013

has directed to pay only interest without any pre-deposit?

(5) Whether the Tribunal is justified in passing different orders for same set of facts involving same issue, for the same appellant both covered by

Rule 8(3A) of the Central Excise Rules, 2002?

3. In view of the filing of these appeals, the writ appeals in W.A. Nos. 935 and 936 of 2013 were closed on 24-7-2014.

4. The plea of Mr. S.M. Deenadayalan, learned counsel for the appellant is that the Commissioner (Appeals), while taking up the Appeal No.

87/2010 (M-IV) in Order-in-Appeal No. 62/2013 (M-IV), dated 20-2-2013, having considered the fact that in respect of a similar demand of

duty of Rs. 14,18,184/- for the period from August, 2008 to March, 2009 unconditional stay of the demand was granted taking note of the fact

that the appellant had debited the said amount in their Cenvat account, ought to have granted unconditional stay of demand for the subsequent

periods also, which is the cause of action for the present batch of appeals, which got entangled into a number of knots purely on hyper technical

plea.

5. The learned counsel for the appellant also pointed out that the Tribunal while dismissing the appeals for non-compliance of the conditional stay

order did not consider Cenvat credit was available and that will be sufficient to safeguard the interest of the Revenue.

6. Mr. P. Mahadevan, learned Senior Standing Counsel appearing for the second respondent has reiterated the stand of the Department before the

Tribunal and authorities below and pleaded for dismissal of these appeals.

7. We have heard Mr. S.M. Deenadayalan, learned counsel for the appellant and Mr. P. Mahadevan, learned Senior Standing Counsel appearing

for the second respondent and perused the orders passed by the Tribunal and the authorities below.

8. We find that there are three periods during which there was clearance of goods in violation of the Central Excise Rules, 2002. For the first

period, which is the subject matter of Order-in-Appeal No. 62/2013 (M-IV) filed against Order-in-Original No. 18/2010, dated 10-6-2010,

initially unconditional stay of pre-deposit was granted. But, we find that subsequently Commissioner (Appeals) while disposing of the appeal on

20-2-2013, on merits, held on facts as follows:

7. The Appellant had defaulted payment of duty and the defaulted payment was beyond a period of 30 days. Having defaulted the duty payable

over 30 days, the Appellants should have paid the duty on the goods cleared, on consignment basis, through PLA/by Cash. But they failed to do

so. The duty in respect of the goods cleared during the said periods was paid through Cenvat credit instead of paying the same through PLA/by

Cash. The Original Authority confirmed the duty demanded and the interest due thereon and imposed penalty of an amount equivalent to the duty

involved under Rule 25 of Central Excise Rules, 2002 (CER).

8. In this regard, I deem it relevant to reproduce the provisions of Rule 8(3A), introduced vide Notification No. 13/2006-C.E. (NT.), dated 1-5-

2006.

If the assessee defaults in payment of duty beyond 30 days from the due date, as prescribed in sub-rule (1), then notwithstanding anything

contained in said sub-rule (1) and sub-rule (4) of Rule 3 of Cenvat Credit Rules, 2004, the assessee shall, pay excise duty for each consignment at

the time of removal, without utilizing the Cenvat credit till the date the assessee pays outstanding amount including interest thereon; and in the event

of any failure, it shall be deemed that such goods have been cleared without payment of duty and the consequences and penalties as provided in

these rules shall follow.

8(i) From the foregoing provisions of Rule 8(3A) of CCR, it is clear that the duty liability discharged by the Appellants through Cenvat cannot be

treated as due discharge of duty liability at all; and it is deemed that the subject goods removed during the disputed period were cleared without

payment of duty. Hence, I uphold the order-in-original on merits as the appellant was liable to pay duty without utilization of Cenvat credit on

consignment basis only, once the default was beyond 30 days from the due date, till they pay the defaulted amount with interest.

8(ii) As the subject demand, to be paid in PLA/cash (without utilization of Cenvat credit) is sustainable, the demand for interest under Section

11AB is also sustainable.

On further appeal, the Tribunal granted conditional stay of the said order, as stated supra.

9. For the subsequent periods, the Order-in-Original was passed demanding duty, interest and penalty. On appeal, the very same Commissioner

(Appeals) disposed of the stay petitions on 22-2-2013, namely, two days after the first order dated 20-2-2013, based on a plea made by the

assessee who offered to pay 50% of the duty confirmed as pre-deposit within one month's time, holding as under:

8. In view of the foregoing facts and circumstances and keeping the interest of Revenue and balance of convenience, I order to pay a pre-deposit

of 50% of the duty confirmed, (Rs. 42,84,883/- for the period May, 2010 to December, 2010 and Rs. 48,46,517/- for the period January, 2011

to October, 2011), in Cash/PLA, in the impugned Order Nos. 08 & 09/2013, dated 30-8-2012 by 21-3-2013 and waive the pre-deposit of

interest and penalty imposed in the impugned order, under Section 35F of CEA.

9. If the Appellants fail to pay the said pre-deposit before the aforementioned due date, the appeal is liable to be dismissed, for noncompliance to

the condition of stay granted in terms of Section 35F of the Central Excise Act, 1944, without any further notice.

10. We find, on merits, that the assessee has lost before the Commissioner (Appeals) during the first period from August, 2008 to March, 2009

and for the subsequent periods, the Commissioner (Appeals), taking note of the offer made by the assessee, was inclined to order pre-deposit of

50% of the duty confirmed. The learned Single Judge also confirmed the order of pre-deposit vide order dated 20-3-2013 made in W.P. Nos.

6752 and 6753 of 2013. The order passed by the Commissioner (Appeals) in Order-in-Appeal No. 62/2013 (M-IV), dated 20-2-2013, in

respect of the first period is in favour of the Revenue. Therefore, balancing the interest of the Revenue and that of the assessee and taking note of

the offer made by the assessee, interim order was passed by the Commissioner (Appeals) for the subsequent periods and the Tribunal also passed

similar orders. We do not find any error in such exercise of discretion by the Tribunal.

11. At this juncture, the learned counsel for the appellant pleaded that as a last chance one month's time may be granted for payment of the pre-

deposit amount, as directed by the Tribunal. He further pleaded that since the Commissioner (Appeals) dismissed the appeals without going into

the merits of the case, the matter may be remitted to the Commissioner (Appeals) for fresh consideration, instead of remanding it to the Tribunal.

The appellant has also filed affidavits dated 14-8-2014 to the said effect and the same are taken on file.

12. Considering the said plea made by the learned counsel for the appellant and the affidavits dated 14-8-2014 filed by the appellant, we permit

the appellant to make pre-deposit of amount in terms of the order of the Tribunal within a period of one month from the date of receipt of a copy

of this order. The Commissioner (Appeals) has not gone into the merits of the matter and the entire issue got bogged down in a legal quagmire at

the stage of ordering pre-deposit itself. Therefore, to cut-short the period of litigation, we remit the matter to the Commissioner (Appeals), by

restoring the appeals to this file. On the appellant complying the conditional order passed by the Tribunal and furnishing proof thereof, the

Commissioner (Appeals) shall take up the appeals on merits and dispose of the same in accordance with law. We find no question of law involved

in these appeals. In the result, these appeals are disposed of accordingly. No costs. Consequently, connected miscellaneous petitions are closed.